82-871

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

A. H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

JANICE ABED, ET. AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is it proper for a court of appeals to vacate a class action certified to resolve the identical punitive damage claim made in thousands of products liability cases when the district court has determined that the requirements of Rule 23 have been satisfied and that a class proceeding is the most effective device for resolving the claims equitably and preventing the judicial system from being engulfed by repetitive trials?

LIST OF PARTIES

Parties to the expedited appeal in the Ninth Circuit were: Janice Abed, *et al.*, and other similarly situated class members represented by counsel in Appeal No. 81-4648; Carin Lynn Abramson and other similarly situated class members represented by counsel in Appeal No. 81-4649; Valerie A. Steinmetz and other similarly situated class members represented by counsel in Appeal No. 81-4650; Hugh J. Davis, M.D., defendant-appellant in Appeal No. 81-4651; A. H. Robins Company, Incorporated,[1] defendant-appellee in

[1] Pursuant to Rule 28.1, the following is a list of non-wholly owned subsidiaries of A. H. Robins Company, Incorporated:

A. H. Robins Company, Limited, incorporated in England
A. H. Robins Company (Thailand) Limited, incorporated in Thailand
A. H. Robins de Mexico, SA de CV, incorporated in Mexico
A. H. Robins (Iran) Company, incorporated in Iran
A. H. Robins (Philippines) Company, Inc., incorporated in the Philippines
A. H. Robins Pty. Limited, incorporated in Australia
Diffucap Eurand S.A.C.I.F.I., incorporated in Argentina
Diffucap—Quimica E. Farmaceutical Ltda., incorporated in Brazil
Diffucap, SA, incorporated in Switzerland
Eurand de Mexico, SA de CV, incorporated in Mexico
Eurand Espanola, S.A., incorporated in Spain
Eurand France, SA, incorporated in France
Eurand International S.r.l., incorporated in Italy
Eurand Italia, S.P.A., incorporated in Italy
Industrial Santa Agape, SA, incorporated in Guatemala
Industrias Galmex, SA, incorporated in Mexico
Instituto Medico Tecnico Sanicol, SA, incorporated in Colombia
Kytta Werk Sauter GmbH, incorporated in Germany
Laboratoires Martinet, SA, incorporated in France
Lee Laboratories, incorporated in Virginia
Medipha, incorporated in France
Microencapsulation S.A., incorporated in Switzerland
Parfums Caron (Canada) Limitee, incorporated in Canada
Parfums Caron Limited, incorporated in England
Parfums Caron, SA, incorporated in France
Parfums Caron S.A. "Suisse," incorporated in Switzerland
Pharia Industrial Company, incorporated in Iran
Societe Immobiliere, incorporated in France

Appeal No. 81-4652; plaintiffs in MDL Docket No. 211 represented by counsel in Appeal No. 81-4653; Louise C. Rankin and other similarly situated class members represented by counsel in Appeal No. 81-4654; Jeanette Braxton-Secret and other similarly situated class members represented by counsel in Appeal No. 81-4655; and Anna Marie Yorke and other similarly situated class members represented by counsel in Appeal No. 81-4656.

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JANICE ABED, ET. AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner A. H. Robins Company, Incorporated, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on June 18, 1982, as amended July 15, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, as yet unreported, is set forth beginning at page 1 of the Appendix. The Order of the United States District Court for the Northern District of California conditionally certifying a nationwide punitive damage class action is reported at

521 F. Supp. 1188 and is set forth at page 86 of the Appendix. The subsequent Memorandum of Opinion and Order of the District Court confirming class certification is reported at 526 F. Supp. 887 and is set forth at page 23 of the Appendix.

JURISDICTION

The District Court had jurisdiction of these actions by virtue of diversity of citizenship under 28 U.S.C. § 1332. The judgment of the Ninth Circuit was entered on June 18, 1982, and amended on July 15, 1982. Rehearing *en banc* was denied August 26, 1982.[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23, respecting class actions, is reproduced in its entirety at page 99 of the Appendix.

STATEMENT OF THE CASE

This action arises from the manufacture and sale of an intrauterine contraceptive device known as the Dalkon Shield by petitioner A. H. Robins Company, Incorporated ("Robins"). Beginning in 1970, Robins sold approximately 2.2 million Dalkon Shields in the United States. Robins ceased distribution of the device and voluntarily withdrew it from the market in 1974. Numerous lawsuits have been brought against Robins, and sometimes other defendants as well, alleging a wide variety of injuries that are claimed to have arisen from use of the Dalkon Shield.

[2] The panel that decided the appeal amended its opinion in certain particulars on July 15, 1982. Timely petitions for rehearing with suggestions for rehearing *en banc* were filed on July 2 and July 23, 1982, respectively. Both petitions were denied on August 26, 1982.

The first attempt to coordinate the management of this litigation was made in 1975 when 54 actions then pending in 22 federal district courts were transferred by the Judicial Panel on Multidistrict Litigation ("JPMDL") to the District of Kansas for consolidated pretrial proceedings.[3] The multidistrict phase of the litigation grew to encompass more than 971 Dalkon Shield cases in federal district courts across the United States. By January 1981, more than five years after commencement of MDL proceedings, the JPMDL found that consolidated discovery had been completed and declared that no further conditional transfer orders would issue.[4]

By May 1981, the District Court for the Northern District of California had approximately 150 Dalkon Shield cases on its docket. The court recognized that despite the MDL proceedings, case-by-case trials could not resolve these actions fairly and efficiently. Based on its knowledge of the facts and its experience in trying a Dalkon Shield case that lasted nine weeks, the District Court undertook to explore whether other procedures could be used to reduce the repetitive nature of the litigation and bring it to a reasonably prompt conclusion.

The proceedings conducted by the District Court led it to conclude that innovative methods were necessary. It found, for example, that as of May 31, 1981, more than 1,500 suits and 300 claims were still pending against

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[3] *In re A. H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation*, 406 F. Supp. 540 (J.P.M.D.L. 1975).

[4] *In re A. H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation*, 505 F. Supp. 221 (J.P.M.D.L. 1981). Although most cases transferred to the MDL proceedings have been remanded to their original courts, approximately 25 cases have been transferred to the MDL proceedings since the January 1981 order as a result of the reopening of discovery by the transferee court with respect to three evidentiary issues.

Robins even though some 3,000 suits and claims had been settled. The compensatory damages sought from Robins in the then pending cases totaled more than $500,000,000, a figure far in excess of Robins' net worth of $280,394,000 as of December 31, 1980. Even more alarmingly, in 1,451 of those cases in which punitive damages were sought, plaintiffs also demanded that Robins pay in the aggregate more than $2,350,000,000.[5] Moreover, the District Court was aware that the average number of new Dalkon Shield suits and claims filed each month was increasing and that the total number of pending actions was on the rise. In these circumstances, the District Court ruled that the "unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress" mandated an attempt to develop a procedural remedy (App. at 25, 87-88).

After careful examination of various alternatives, the District Court determined that on balance class certification offered the most equitable and efficient means of resolving the Dalkon Shield litigation. Accordingly, by order entered June 25, 1981, the District Court conditionally certified two class actions (App. at 86). The first of these, a nationwide punitive damage class action, was certified under Fed.

[5] At the time of class certification, two punitive damage awards had been entered against Robins. In *Deemer v. A. H. Robins Co.*, No. C-30649 (Dist. Ct., Sedgwick Co., Kan., Feb. 3, 1975), a judgment for punitive damages was entered in the amount of $75,000. This judgment has been satisfied. In *Palmer v. A. H. Robins Co.*, C.A. No. C-60442 (Dist. Ct., City and Co. of Denver, Colo., July 30, 1979), *appeal docketed*, No. 81 SA 149 (Colo. Sup. Ct., April 6, 1981), a punitive damage judgment was entered in the amount of $6,200,000. Following class certification, a third judgment for punitive damages was entered in the amount of $500,000 in *Worsham v. A. H. Robins Co.*, No. 80-1590-CIV-WMH (S.D. Fla., Aug. 4, 1982). The *Palmer* and *Worsham* cases are presently on appeal.

R. Civ. P. 23(b)(1)(B). The purpose of this class action was to determine in a single proceeding Robins' total liability for punitive damages for its course of conduct in manufacturing and marketing the Dalkon Shield. Class certification was necessary, in the opinion of the District Court, to ensure that any punitive damages awarded would be distributed equitably to those class members entitled to receive them (App. at 34-35). The District Court also observed that it would be possible in such a proceeding to give effect to the "implied in law ceiling" on punitive damages that limits the amount of punishment that may be imposed on any defendant (App. at 35-36). The District Court announced that the issue of punitive damages would be tried to a jury to determine liability, if any, and the total amount to be awarded. Any award would be held as a fund from which class members would recover on a pro rata basis to be determined by the District Court.

The second class action, a statewide liability proceeding under Fed. R. Civ. P. 23(b)(3), was certified to permit resolution of certain liability issues that are common to all Dalkon Shield plaintiffs with actions pending in the federal courts in California. Upon completion of this class action, each class member would proceed in her original suit to a trial on individual issues such as causation and damages. Both class actions, the District Court believed, would promote the goals of judicial economy and efficiency and serve the interests of all litigants by eliminating repetitious litigation of virtually identical issues.

On November 5, 1981, the Court issued a memorandum opinion respecting the conditional class certifications and certified the issues for interlocutory appeal to the United States Court of Appeals for the Ninth Circuit (App. at 23, 80). The Court of Appeals granted the interlocutory appeal,

on an expedited basis, on December 11, 1981. Respondents sought reversal of the District Court's certification of both the nationwide punitive damage class and the statewide liability class. Robins sought affirmance of the nationwide punitive damage class certification.

On June 18, 1982, a panel of the Ninth Circuit announced its decision vacating and remanding the District Court's class certification order. The panel held that the District Court had misapplied the criteria of Fed. R. Civ. P. 23(a) and (b) in certifying both class actions. The panel rejected Robins' argument that punitive damages, as distinguished from compensatory damages, were susceptible to resolution in a single proceeding that would guarantee equal treatment to all class members. Instead, the panel agreed with appellants that the facts and circumstances of the Dalkon Shield litigation were too diverse and too individualized to permit even the limited type of class actions envisioned by the District Court.

In its petition for rehearing and rehearing *en banc*, Robins contended that the panel's decision unnecessarily restrained and curtailed "the conscientious and deliberate effort of the District Court to respond efficiently and fairly to the procedural problems of mass products liability litigation." The panel disagreed and denied Robins' petition on August 26, 1982.

REASONS FOR GRANTING THE WRIT

I

The proper use of class actions in mass products liability litigation is a question of substantial importance to the efficient functioning of the nation's judicial system and should be addressed by this Court.

One of the most serious phenomena of contemporary American law is the burgeoning of mass tort litigation. In

the products liability area alone, there are presently pending in the federal and state courts thousands or even tens of thousands of actions involving asbestos, Agent Orange, DES, the Dalkon Shield, and countless other products and substances.[6] Measures such as the Omnibus Judgeship Act of 1978, Public Law 95-486, providing for the appointment of 147 additional federal district and circuit court judges, have been insufficient to cope with this outburst of litigation.[7] If the proliferation of suits and claims arising from the manufacture and mass marketing of such products is to be handled efficiently and fairly, alternatives to case-by-case litigation must be developed.

A concomitant development has been the increased assertion of huge punitive damage claims and the willingness of American juries and courts to render large punitive awards to single litigants. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982). As these claims and awards increase in our courts, the serious attendant problems may become catastrophic for both the courts and litigants.

An award of punitive damages to a plaintiff in one case impacts the potential recovery of a plaintiff in a later case. After an award of punitive damages to one plaintiff, subsequent plaintiffs face increasing risks that the defendant will

[6] The 9,071 products liability actions filed in the federal district courts in 1981 represent an increase of 17% over 7,755 such cases filed in 1980, thereby continuing a steady trend that began in 1974. *1981 Annual Report of the Administrative Office of the United States Courts* at 218.

[7] The number of new civil cases filed per authorized judgeship in the federal district courts was 350 in 1981 and 400 in 1982, as compared with the former record high of 348 in 1978, the year the Omnibus Judgeship Act was passed. Even with an increased disposition rate, "the pending caseload continued to grow." *1982 Annual Report of the Director* at 3. The number of pending cases increased more than 23% between 1978 and 1982. *Id.*

be found to have been sufficiently punished. The greater the number of plaintiffs, the more serious this risk becomes. In an age of multi-million dollar individual verdicts, it does not take long for the recovery by one or a few plaintiffs to effectively preclude thousands of other plantiffs from a share of the total recoverable punitive damages. Widely varying punitive damage awards can be expected to provide some plaintiffs with million dollar windfalls and other plantiffs with nothing.

Rule 23 is flexible enough to provide the procedural alternative to traditional case-by-case litigation that is needed to ensure fairness to litigants and relief for the courts from burdensome, duplicative litigation. It is a matter of familiar history that when the current version of Rule 23 was adopted in 1966, the Advisory Committee Note observed that "a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action. . . ." 39 F.R.D. 69, 103 (1966). The key word, too often overlooked in that statement, is "ordinarily." The clear implication is that there are some extraordinary mass accident cases for which a class action is appropriate. The increased volume and changing nature of litigation since 1966 have made it more necessary than ever that innovative use of devices such as the class action be allowed. The commentators have confirmed in recent years that class actions are emerging as a useful solution to the problem of repetitious litigation of similar claims and issues in a number of different contexts, including the mass tort. 7A Wright & Miller, *Federal Practice and Procedure: Civil* § 1783 (1972 and 1981 Supp.); 3B Moore, *Federal Practice* ¶ 23.02 [2.-18] (2d ed. 1982); Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664 (1979).

The courts, while acutely aware of the need to protect important individual interests, have also begun to recognize the valuable role that class certification can play in modern, complex litigation. Today, there are at least two major products liability cases conditionally proceeding as class actions. *In re "Agent Orange" Product Liability Litigation,* 506 F. Supp. 762 (E.D.N.Y. 1980); *Payton v. Abbott Labs,* 83 F.R.D. 382 (D. Mass. 1979). The impetus for similar actions in the future seems likely to grow rather than abate. Although the Eighth Circuit held that the Anti-Injunction Act, 28 U.S.C. § 2283, required reversal of the lower court's action in the Hyatt Regency tragedy, it did not condemn class certification in mass tort litigation. On the contrary, the appellate court commended the district judge for "his creative efforts in attempting to achieve a fair, efficient and economical trial for the victims of the Hyatt Regency disaster." *In re Federal Skywalk Cases,* 680 F.2d 1175, 1184 (8th Cir.), *cert. denied,* No. 82-217 (Nov. 8, 1982). Finally, in a case now pending before this Court, the Illinois Supreme Court has determined that the class action mechanism can be profitably and constitutionally utilized to solve at least some of the problems arising out of mass consumer litigation. *Miner v. The Gillette Co.,* 87 Ill.2d 7, 428 N.E.2d 478 (1981), *cert. granted,* 102 S.Ct. 1767 (1982).

The judgment of the Ninth Circuit is contrary to the tenor of these decisions. It unnecessarily and imprudently forestalls further development of class action procedures. The alternatives to expanded use of class action procedures are themselves ill-defined and troublesome. In recent months, three manufacturers of asbestos products, Manville Corporation, UNR Industries, and Amatex Corp., have sought protection under Chapter 11 of the federal bankruptcy laws from the mounting tide of products liability litigation. As a

result, the ability of litigants to obtain prompt, complete redress for asbestos-related injuries has been jeopardized. Even in less extreme situations, however, products liability suits and claims are greatly prolonged by the existence of hundreds of separate actions in courts throughout the country. At some point, justice delayed becomes justice denied for plaintiffs and defendants alike.

This Court can and must determine whether class certification is a valid means of addressing the problems posed by mass products liability litigation. Review and decision are necessary at this time not only to resolve some of the uncertainties of the Dalkon Shield litigation but also to provide guidance to the courts in fashioning pragmatic procedures for future litigants embroiled in massive litigation of this kind.

II

The decision below improperly interfered with the discretion accorded the District Court to supervise and manage litigation pending before it.

This Court has held that "[t]he certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court." *Califano v. Yamasaki,* 442 U.S. 682, 703 (1979). The district court's class certification may not be reversed absent a finding of abuse of discretion. *Id.; Price v. Lucky Stores, Inc.,* 501 F.2d 1177 (9th Cir. 1974).

The decision to certify a class action should not be lightly overturned, particularly where it is apparent that the district court has not acted precipitously, has given due consideration to the prerequisites of Rule 23, and has made factual investigations sufficient to satisfy itself that class certification is appropriate. Restricting the scope of appellate review of class certification orders is especially appropriate in view

of their inherently tentative nature. The district court's obligation to monitor constantly the progress and prospects of the class action, and to decertify it if necessary in order to protect the interests of class members, affords the court ample opportunity to address any procedural deficiencies that may arise. When the Ninth Circuit reversed the class certification because of what it called the "combined difficulties" of maintaining a class action in this litigation, it barred use of the class action at the outset, rather than allowing the suit to develop so that it might be seen whether these difficulties would in fact arise and, if so, whether ways might be found to surmount them short of decertification.

This Court has been keenly mindful that the initial and principal responsibility for the proper administration of justice in the federal courts is on the district courts, and has been unwilling to permit courts of appeal to second-guess what necessarily are decisions involving a great deal of discretion. If a trial court certifies a portion of a case for immediate appeal under Civil Rule 54(b), the reviewing court is to disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980). If the district court's determination is "based on an intimate knowledge of the case and is a reasonable one," it has not abused its discretion and the appellate court is not to interfere. *Id.* at 12. Similarly, in determining what sanctions are appropriate for failure to comply with discovery orders, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

Only last term this Court made clear in the context of Civil Rule 52(a) that decisions of the district courts based on factual findings fairly made are to be accorded great deference by the reviewing courts. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S.Ct. 2182 (1982); *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982). Application of this principle to class certification orders is proper because the district court, confronted by dozens or even hundreds of related actions, is ordinarily in the best position to obtain first-hand facts and information concerning the likely complexity and duration of individual trials, the extent and prevalency of similar suits, and the potential impact of uncoordinated case-by-case litigation on its docket. Moreover, the district court is better able to perceive the degree to which complex, multiparty litigation can be simplified and expedited to the benefit of all litigants and the judicial system.

By reversing the District Court, the Ninth Circuit has rejected the ample findings of that court concerning the existence of a limited fund upon which a class action may be certified under Rule 23(b)(1)(B). This is contrary to the teaching of *Inwood Laboratories* and *Pullman-Standard*. In addition, the panel below has drawn into question the degree of discretion that is to be granted the district courts in the certification and management of class actions. This is contrary to what this Court said in *Califano* about these matters being within the discretion of the district court, and it is contrary to the spirit of such decisions as *Curtiss-Wright* and *National Hockey League* in which this Court has emphasized that case management is to be left to the district courts. It is the more remarkable that the Ninth Circuit did not find that the District Court had abused its discretion and that the appellate court failed even to make any reference to that standard of review.

The decision of the Ninth Circuit in this respect appears to conflict in principle with that of the Sixth Circuit in *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977) (class certification in Beverly Hills Supper Club fire), *mandamus refused sub nom. Union Light, Heat & Power Co. v. United States District Court*, 598 F.2d 543 (6th Cir. 1978), *appeal dismissed*, 443 U.S. 913 (1979), where the court refused to substitute its judgment for that of the district court when it appeared that the district judge was proceeding cautiously with due regard for both the interests of the litigants and considerations of comity and federalism. At the very least, it stifles the use of class action procedures and ignores the necessity for innovative procedural response to the difficult problems posed by mass products liability litigation. Furthermore, it is contrary to the dictates of Rule 23 itself.[8]

This Court has not considered Rule 23(b)(1)(B) since the Civil Rules were amended in 1966. It has expressed its concern about the dangers of punitive damages on more than one occasion. *See. e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). If punitive damages are limited in their amount and purpose as theory indicates, then a Rule 23(b)(1)(B) class action, as found by the District Court, is an appropriate mechanism for

[8] In its technical analysis of the requirements of Rule 23(b)(1)(B), the panel adhered to the strict "inescapably alter" standard established by the Ninth Circuit in the early case of *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973). This test is unnecessarily restrictive and not in keeping with the language of the Rule. In addition, it appears to conflict at least in principle with the standard used by some other courts. *See generally Eliasen v. Green Bay & Western Ry.*, 93 F.R.D. 408, 412 n.2 (E.D. Wis. 1982); and cases cited at Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 634 n.22 (1978).

determining the liability, if any, of Robins and equitably distributing any punitive damages awarded. Only this Court can determine, however, the proper accommodation between district court action and appellate review, and ultimately describe the contours of Rule 23 as applied to emerging nationwide products liability litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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